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EXAMINER

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Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DEAN F. BOYER and
W. EDWARD HAMMERSLA III

Appeal 2009-009578
Application 09/690,940
Technology Center 3600

Before MURRIEL E. CRAWFORD, HUBERT C. LORIN, and
BIBHU R. MOHANTY, *Administrative Patent Judges*.

LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Dean F. Boyer, et al. (Appellants) seek our review under 35 U.S.C. § 134 (2002) of the final rejection of claims 48-111. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM-IN-PART and enter a new ground of rejection pursuant to 37 C.F.R. 41.50(b).²

THE INVENTION

The invention is “a system and method for determining at the point of service the portion of a service or product which is to be paid by a third party payor.” Specification 1:7-10.

The pertinent portions of claim 48, reproduced below, are illustrative of the subject matter on appeal.

48. A system for debiting a payment system access card to provide substantially near real-time reimbursement to a point of service provider by a third party comprising: . . .

a payment system comprising a payment system network interface operably coupled to said network and adapted to receive said substantially real-time adjudicated settlement transaction, wherein said payment system is adapted to in substantially real-time debit said payment system access card for said third party payment amount to

² Our decision will make reference to the Appellants’ Appeal Brief (“App. Br.,” filed Jun. 23, 2008) and Reply Brief (“Reply Br.,” filed Oct. 29, 2008), and the Examiner’s Answer (“Answer,” mailed Jan. 16, 2009).

be paid by said third party to reimburse said point
of service provider of said covered portion.

THE REJECTIONS

The Examiner relies upon the following as evidence of
unpatentability:

Barber	US 4,858,121	Aug. 15, 1989
Sackler	US 5,235,507	Aug. 10, 1993
Little	US 5,359,509	Oct. 25, 1994

Speedware, Prospective Health Inc. Announce Reseller Agreement,
Newswire, Jan. 20, 1998, at 1. [Hereinafter Newswire.]

The following rejections are before us for review:

1. Claims 92 and 93 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.
2. Claims 48-111 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. Claims 48-52, 54-56, 60-62, 67-71, 73-74, 78-79, 83, 87-90, and 94-98 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, and Newswire.
4. Claims 53, 57-59, 63-66, 72, 75-77, 80-82, 84-86, 91, and 99-111 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, Newswire, Sackler.

ISSUES

The first issue is whether claim 92 fails to comply with the written description requirement of 35 U.S.C. § 112, first paragraph. Specifically, the issue is whether the Specification supports the limitation “wherein at least a portion of said payment is from a pre-funded account.”

The second issue is whether claim 93 fails to comply with the written description requirement of 35 U.S.C. § 112, first paragraph. Specifically, the issue is whether the Specification supports the limitations “the first third party payer” and “the second third party payer.”

The third issue is whether claims 48-111 are indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention under 35 U.S.C. § 112, second paragraph. Specifically, the issue is whether the recitations of “approximately real-time” and “substantially real-time” render the claim indefinite.

The fourth issue is whether claims 48-52, 54-56, 60-62, 67-71, 73-74, 78-79, 83, 87-90, 94, 95, and 96-98 are unpatentable under 35 U.S.C. § 103(a) over Barber, Little, and Newswire. Specifically, the major issue is whether Barber describes a payment system that is adapted to or a method having a step, in substantially real-time, to debit the payment system access card for the third party payment amount to be paid by the third party to reimburse said point of service provider for the covered portion.

The fifth issue is whether claims 53, 57-59, 63-66, 72, 75-77, 80-82, 84-86, 91, and 99-111 are unpatentable under 35 U.S.C. § 103(a) over Barber, Little, Newswire, and Sackler.

FINDINGS OF FACT

We find that the following enumerated findings of fact (FF) are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. The Specification on page 17, line 18 states that “the employer may issue a securitized card.”
2. The Specification describes the adjudication engine allocating part of the financial responsibility to “co-insurance”. Pg. 27, l. 32 - pg. 28, l. 4.
3. Barber describes a physician terminal that includes a swipe card reader for reading identifications. Col. 2, ll. 10-15.
4. Barber describes that a card reader 12 reads patient identification cards, credit cards, or smart cards. Col. 4, ll. 11-25.
5. Barber describes that the patient identification card includes the patient identification and the insurance company identification. Col. 1, l. 65-col. 2, l. 1.
6. Barber describes that the patients pay by credit card. Col. 10, ll. 50-53. *See also* col. 1, l. 67 - col. 2, l. 6 and col. 8, ll. 1-2 and ll.30-34.
7. Barber describes that the insurance companies pay by check or electronic funds transfer after a “preselected number of days, *e.g.* fourteen.” Col. 3, ll. 60-64 and col. 7, ll. 30-37 and 53-54.
8. Newswire discloses software for “real-time centralized benefit processing, claims’ editing, adjudication and control of multiple provider sites for benefit management organizations.” Pg. 1.

ANALYSIS

Claims 92 and 93 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claim 92

The Examiner rejected claim 92 as failing to provide support for the limitation “wherein at least a portion of said payment is from a pre-funded account.” Answer 4. The Appellants argue that the Specification on page 17, line 18 states that “the employer may issue a securitized card” (*See* FF 1) and that “[o]ne of ordinary skill in the art would immediately recognize that ‘securitized card’ means a payment card that is issued to someone who does not have a sufficient credit rating to obtain credit, where the card is secured by a fund of money that has been put on deposit with the card issuer.” Reply Br. 2. *See also* App. Br. 11.

“What is claimed by the patent application must be the same as what is disclosed in the specification; otherwise the patent should not issue.”

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 736 (2002). All that is necessary to satisfy the description requirement is to show that one is “in possession” of the invention. The decision in *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565 (Fed. Cir. 1997) accurately states the test.

One shows that one is ‘in possession’ of the invention by describing the invention, with all its claimed limitations, not that which makes it obvious. *Id.* (“[T]he applicant must also convey to those skilled in the art that, as of the filing date sought, he or she was in possession of the invention. The invention is, for purposes of the ‘written description’ inquiry, whatever is now claimed.”) (emphasis in original). One does that by such descriptive means as words,

structures, figures, diagrams, formulas, etc., that fully set forth the claimed invention. Although the exact terms need not be used in haec verba, *see* Eiselstein v. Frank, 52 F.3d 1035, 1038 . . . (Fed.Cir.1995) (“[T]he prior application need not describe the claimed subject matter in exactly the same terms as used in the claims”), the specification must contain an equivalent description of the claimed subject matter.

Lockwood v. Am. Airlines, Inc., 107 F.3d at 1572 (emphasis original).

Compliance with the written description requirement is a question of fact.

See Ralston Purina Co. v. Far-Mar-Co, Inc., 772 F.2d 1570, 1575 (Fed. Cir. 1985).

The Examiner responds that a credit card is not a pre-funded account, but does not address whether or not a *securitized* card is a pre-funded account as the Appellants argue. *See* Answer 17. The Examiner has not established that the Specification fails to provide adequate written description for this limitation. Accordingly, we find that the Appellants have overcome the rejection of claim 92 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claim 93

The Examiner also rejected claim 93 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Answer 4. The Examiner asserts that the limitations of a “first third party payer” and a “second third party payer” are not present in the Specification. *Id.* The Appellants argue that the Specification on page 28, lines 2-4 describes allocating payment to “co-insurance” (*See* FF 2) and asserts “[a]s is well-known in the insurance art, the term ‘co-insurance’ indicates that the patient has more than one insurance policy that may cover

treatment, therefore indicating that there may be a ‘first third party payer’ and ‘second third party payer’.” App. Br. 11-12. *See also* Reply Br. 2-3. The Examiner responds that this is not sufficient support. Answer 17-18.

Again, “Although the exact terms need not be used in haec verba, see *Eiselstein v. Frank*, 52 F.3d 1035, 1038 . . . (Fed.Cir.1995) (“[T]he prior application need not describe the claimed subject matter in exactly the same terms as used in the claims”), the specification must contain an equivalent description of the claimed subject matter.” *Lockwood v. Am. Airlines, Inc.*, 107 F.3d at 1572 (emphasis original).

The Examiner has not established that the Specification fails to provide adequate written description support for this limitation. Accordingly, we find that the Appellants have overcome the rejection of claim 93 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

Claims 48-111 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 48-78 and 87-111

In the rejection, the Examiner asserts that claims 48-78 and 87-11 are indefinite because they recite the relative term “substantially.” Answer 4. The Examiner states: “The examiner cannot determine what constitutes substantially . . . real time. Is “substantially real time” five seconds, 10 seconds, one minute or less? For this reasons the claims are rendered as indefinite.” *Id.* The Appellants disagree and argue that an exact time

limitation is not required by 35 U.S.C. § 112, second paragraph. App. Br. 12-14.

We find that the Examiner has not established a prima facie case of indefiniteness simply by resting on the existence of the term “substantially.”

Expressions such as “substantially” are used in patent documents when warranted by the nature of the invention, in order to accommodate the minor variations that may be appropriate to secure the invention. Such usage may well satisfy the charge to “particularly point out and distinctly claim” the invention 35 U.S.C. §112, and indeed may be necessary in order to provide the inventor with the benefit of his invention. In *Andrew Corp. v. Gabriel Elecs. Inc.*, 847 F.2d 819, 821-22, 6 USPQ2d 2010, 2013 (Fed.Cir.1988) the court explained that usages such as “substantially equal” and “closely approximate” may serve to describe the invention with precision appropriate to the technology and without intruding on the prior art. . . . It is well established that when the term “substantially” serves reasonably to describe the subject matter so that its scope would be understood by persons in the field of the invention, and to distinguish the claimed subject matter from the prior art, it is not indefinite. Understanding of this scope may be derived from extrinsic evidence without rendering the claim invalid.

Verve LLC v. Crane Cams Inc., 311 F.3d 1116, 1120 (Fed. Cir. 2002).

“Mathematical precision should not be imposed for its own sake.” *Modine Manufacturing Co. v. International Trade Commission*, 75 F.3d 1545, 1557 (Fed. Cir. 2001).

Accordingly, we find that the Appellants have overcome the rejection of claims 48-78 and 87-111 under 35 U.S.C. § 112, second paragraph, as

being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 79-82

As we explain below, we find that claims 79-82 do not recite patentable subject matter. That finding is dispositive of the patentability of these claims and, therefore, we need not reach the questions of whether claims 79-82 are indefinite under 35 U.S.C. § 112, second paragraph. *See Ex parte Gutta*, 93 USPQ2d 1025, 1036 (Bd. Pat. App. & Int. 2009) (precedential).

The rejection of claims 79-82 under 35 U.S.C. § 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention is reversed in light of the new ground of rejection under 35 U.S.C. § 101 below.

Claims 83-86

In the rejection, the Examiner asserts that the recitation of “approximately” rendered these claims indefinite. Answer 4. However, claims 83-86 do not recite “approximately.” Accordingly, we find that the Examiner has failed to establish that claims 83-86 are indefinite under 35 U.S.C. § 112, second paragraph. Accordingly, we find that the rejection of claims 48-78 and 87-111 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention is overcome.

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Claims 48-52, 54-56, 60-62, 67-71, 73-74, 78, 83, 87-90, and 94-98 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, and Newswire.

Apparatus Claims 48-52 and 54-56

Claim 48 recites “a payment system . . . wherein said payment system is adapted to in substantially real-time debit said payment system access card for said third party payment amount to be paid by said third party to reimburse said point of service provider of said covered portion.” In the rejection, the Examiner cites column 2, lines 10-25 and column 4, lines 10-20 of Barber to teach this limitation (Answer 5-6), which describe a card reader that reads patient identification cards, credit cards, or smart cards (FF 3-4).

The Appellants argue that Barber teaches a payment system access card that may be debited to provide reimbursement from a third party.

Reply Br. 5. *See also* App. Br. 17-18. The Appellants argue that:

While the card disclosed in Barber can provide patient identification, Barber does not disclose “a payment system access card” that can be debited for a covered portion that is to be paid by the third party to the service provider. Instead, Barber disclose that “when fund are received from the insurance company, whether by check or electronic fund transfer, the central processing system B communicated directly or by printed authorization with the computers of bank and other financial institutions to transfer the appropriate funds to the account of each physician.” *See* Barber, Col. 3, ll. 62-67 (emphasis added).

App. Br. 18 (emphasis original).

The Examiner responds: “Appellant’s argument that Barber et al. does not show or suggest a payment access card, are acknowledged. However,

Barber et al. does disclose the use of a credit card (column 4, line[s] 14-18). Therefore, Barber et al. is considered to fully meet the aforementioned limitation.” Answer 19.

We find that Barber’s descriptions of a patient information card and a credit card do not teach the limitation at issue. As the Appellants argue, Barber does not teach that the payment system debits the patient identification card for said third party payment amount to be paid by said third party to reimburse said point of service provider of said covered portion. The patient identification card of Barber is not a credit card or a debit card (*See* FF 5 and 7) and therefore the payment system is not capable of debiting the patient identification card. Further, the credit card of Barber is the patient’s credit card, which Barber’s payment system is adapted to debit the patient’s payment amount to and not the third party payment amount to. FF 6.

Accordingly, we find that the Appellants have overcome the rejection of claim 48, and claims 47-52 and 54-56, dependent thereon, under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, and Newswire.

Method Claims 60-62, 67-71, 73-74, 78, and 83

Claim 60 recites “debiting said access card substantially in real-time for said covered portion that is to be paid by said third party.” Independent claims 67 and 83 also recited similar limitations. The Examiner relied upon the same reasoning used to reject claim 48 in rejecting these claims (Answer 9-10), and the Appellants traverse the rejection of claim 60, 67 and 83 for the same reasons used to traverse the rejection of claim 48 above. App. Br. 34-35. For the reasons discussed above with regards to claim 48, we find

that the Appellants have overcome the rejection of claims 60, 67, and 83, and claims 61, 62, 68-71, 73-74, and 78, dependent thereon, under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, and Newswire.

Method Claims 87-90 and 94-98

Claim 87 recites “said payment system adapted to receive said adjudicated settlement transaction and in response to initiate reimbursement of said third party payment amount to said service provider substantially at the time of said purchase transaction.” The Appellants argue that none of the prior art addresses this limitation for the reason used to traverse the rejection of claim 48. App. Br. 35-36.

However, the Appellants’ arguments with respect to claim 48 address whether the prior art does not does not teach an access card or substantially real-time *payment*. See App. Br. 14-31 and Reply Br. 5. Claim 87 does not recite these limitations. Further, we note that claim 87 only requires *initiating reimbursement* substantially at the time of the purchase transaction and does not require actual payment as recited in claim 48. Therefore, the Appellants’ argument is based on a limitation not recited in the claim.

We also sustain the standing 35 U.S.C. § 103(a) rejection of dependent claim 88-90 and 94-98 as being unpatentable over Barber, Little, and Newswire since the Appellants have not challenged such with any reasonable specificity (*see* App. Br. 36-37), thereby allowing claims 88-90 and 94-98 to stand or fall with parent claim 87 (*see In re Nielson*, 816 F.2d 1567, 1572 (Fed. Cir. 1987)).

Accordingly, we find that the Appellants have not overcome the rejection of claims 87 and claims 88-90, 94, 95, and 96-98, dependent

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thereon, under 35 U.S.C. § 103 (a) as being unpatentable over Barber, Little, and Newswire.

The rejection of claims 53, 57-59, 63-66, 72, 75-77, 84-86, 91, and 99-111 under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, Newswire, and Sackler.

Claims 53, 57-59, 63-66, 72, 75-77, and 84-86

These rejections are directed to claims dependent on claims 48, 60, 67, and 83, whose rejection we have reversed above. For the same reasons, we will not sustain the rejections of claims 53, 57-59, 63-66, 72, 75-77, and 84-86 over the cited prior art. *Cf. In re Fritch*, 972 F.2d 1260, 1266 (Fed. Cir. 1992) ("[D]ependent claims are nonobvious if the independent claims from which they depend are nonobvious."). We note that the Examiner did not rely upon Sackler to cure the deficiencies of Barber addressed above. *See Answer 12-16.* Accordingly, we find that the Appellants have overcome the rejection of claims 53, 57-59, 63-66, 72, 75-77, 84-86, 91, and 99-111 under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, Newswire, and Sackler.

Claim 91

We also shall sustain the standing 35 U.S.C. § 103(a) rejection of dependent claim 87 as being unpatentable over Barber, Little, Newswire, and Sackler since the Appellants have not challenged such with any reasonable specificity, thereby allowing claim 91 to stand or fall with parent claim 87 (*see In re Nielson*, 816 F.2d 1567, 1572 (Fed. Cir. 1987)).

Claims 99-111

Claim 99 recites “wherein said funds transfer for said covered portion is initiated substantially in real-time to the purchase of said good or service from said point of service provider.” The Examiner relies upon the rejection of claims 60, 67, 74, 78, 79, and 70 to reject claim 99 (Answer 14) and the Appellants “submit that claim 99 is allowable in view of the references of record for the same reasons set forth above with respect to claims 60, 67, 74, 78, 79, and 87” (App. Br. 40-41).

We note that the limitation at issue is most similar to the limitation of dependent claim 78. To reject dependent claim 78, the Examiner states:

Barber/ Little/Newswire discloses the claimed method supra and Barber further disclose transferring funds in accordance with said adjudicated transaction to said point of service (Column 2, lines 21-25), while Newswire discloses that the transfer happens in substantially real-time proximate to the receipt of said adjudication transaction.

Answer 9. However, the Examiner does not provide a citation to Newswire to support the assertion that it “discloses that the transfer happens in substantially real-time proximate to the receipt of the adjudication transaction” (*Id.*) and does not provide some rationale with logical underpinnings to modify Barber with Newswire to teach the limitation at issue. We note that Newswire seems to be directed to “real-time centralized benefit processing, claims’ editing, adjudication and control of multiple provider sites for benefit management organizations” (FF 7), but is silent as to payment transactions. We note that the Examiner did not rely upon Sackler to cure the deficiencies above. *See* Answer 12-16. The Examiner has failed to establish a prima facie showing of obviousness in rejecting

claim 99. Accordingly, we find that the Appellants have overcome the rejection of claim 99 and claims 100-111, dependent thereon, under 35 U.S.C. § 103(a) over Barber, Little, Newswire, and Sackler.

The rejections of claims 79-82 under 35 U.S.C. § 103(a).

As we explain below, we find that claims 79-82 do not recite patentable subject matter. That finding is dispositive of the patentability of these claims and, therefore, we need not reach the questions of whether claims 79-82 would have been obvious under 35 U.S.C. § 103. *See Ex parte Gutta*, 93 USPQ2d 1025, 1036 (Bd. Pat. App. & Int. 2009) (precedential).

The rejection of claim 79 under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, and Newswire as well as the rejection of claims 80-82 under 35 U.S.C. § 103(a) as being unpatentable over Barber, Little, Newswire, and Sackler is reversed in light of the new ground of rejection under 35 U.S.C. § 101 below.

NEW GROUND OF REJECTION

Pursuant to 37 C.F.R. 41.50(b), we enter a new ground of rejection on claims 79-82. We reject claims 79-82 under 35 U.S.C. § 101 as being drawn to non-statutory subject matter.

Taking claim 79 as representative, claim 79 is directed to a signal. Claim 79 recites “[a] computer data signal embodied in a carrier wave.” A signal does not fit within at least one of the four statutory subject matter categories under 35 U.S.C. § 101. *In re Nuijten*, 500 F.3d 1346, 1357 (Fed. Cir. 2007). Accordingly, we reject claim 79, and claims 80-82, dependent

thereon under 35 U.S.C. § 101 as being directed to non-statutory subject matter.

DECISION

The decision of the Examiner to reject claims 48-86, 92-95, and 99-111 is reversed

The decision of the Examiner to reject claim 87-91 and 96-98 is affirmed.

We enter a new ground of rejection on claims 79-82.

This decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)). 37 C.F.R. § 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

- (1) Reopen prosecution. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner
- (2) Request rehearing. Request that the proceeding be reheard under § 41.52 by the Board upon the same record

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)

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